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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 122.

SAMUEL A. MYERS and HARRY MYERS
as S. A. & H. Myers,
Petitioners.

v.

INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

JOHN R. LAZENBY,
For the Respondent.

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Supreme Court of the United States.

OCTOBER TERM, 1926.

SAMUEL A. MYERS and HARRY MYERS, as S. A. & H. MYERS, Petitioners,

vs.

INTERNATIONAL TRUST COMPANY, Respondent.

BRIEF OF RESPONDENT.

In 1916 Samuel A. Myers and Harry Myers carried on a clothing business in Boston as partners under the firm name of S. A. & H. Myers. (Rec., p. 12.)

Beginning with October 2, 1916, and ending December 19, 1916, the partnership borrowed $20,000 from the International Trust Company, giving a series of ten notes, each for $2,000. The form of the notes was "we promise to pay to the order of ourselves $2,000." They were signed "S. A. & H. Myers," and on the back were endorsed "S. A. & H. Myers, Samuel Myers, Harry Myers." (Exh. A to J, Rec., pp. 6 to 9.) Samuel A. Myers endorsed all ten—Harry Myers endorsed nine. The making of the notes and the endorsements were admitted. (Rec., pp. 12 to 13.)

On January 27, 1917, an involuntary petition in bankruptcy was filed in the District Court, District of Massachusetts, alleging that "Samuel A. Myers and Harry Myers, both of Brookline, in the County of Norfolk, copartners trading as *S. A. & H. Myers*, have for the greater portion of six months next preceding the date of filing

this petition had *his* principal place of business at Boston, in the County of Suffolk, and State and District aforesaid and *owes* debts to the amount of $1,000," were insolvent. The prayer of the petition was "that service of this petition, with a subpoena, may be made upon Samuel A. & H. Myers as provided in the Acts of Congress relating to bankruptcy, and that *he* may be adjudged by the Court to be *a bankrupt* within the purview of such acts." (Exh. 2.) (Italics not in original.)

On February 9, 1917, schedules (Exh. 3) were sworn to and filed on February 10, 1917. One set only of the schedules was filed and sets out "Samuel A. Myers of Boston and Harry Myers of Brookline respectfully represent: That they clothing business have been partners under the firm's name of S. A. & H. Myers having their principal place of business at Boston, in the County of Suffolk and District and State of Massachusetts, for the greater portion of the six months next immediately preceding the filing of this petition; that said partners owe debts which they are unable to pay in full * * *"

In Schedule A is set out "a full and complete statement of all the debts of said partners" and in B all the property "of said partners." The form used had schedules C, D, E and F, in which were to be set out the debts and assets of the individuals. Each of the individuals struck out the paragraph relating to schedules C, D, E and F, and substituted the statement "that he has no individual debts and no individual assets except household furniture and wearing apparel to the value of $300 claimed to be exempt under Revised Laws of Massachusetts, Chapter 177, Section 34." (Exh. 3.)

In Schedule A, which contained a list of the firm debts, the International Trust Company appears as a creditor for $20,000. In no place does the Trust Company appear as a creditor on account of the endorsements of each of the individuals. (Exh. 3.)

Concurrently with the schedules was filed a petition for a meeting of creditors to consider an offer in composition of 40% upon all unsecured debts "in satisfaction of their debts is to be proposed *before adjudication* * * *" (Exh. 4, Rec., p. 18.) (Italics not in original.)

On March 3, 1917, an offer in composition was filed: "Respectfully *represents* Samuel A. Myers, of Boston in the County of Suffolk in said District, and Harry Myers, of Brookline in the County of Norfolk and district aforesaid: that the said Samuel A. Myers & Harry Myers have been examined in open Court at a meeting of their creditors, that they have filed in Court a schedule of their property and a list of creditors to be filed by bankrupt; and that they now offer the following terms of composition before adjudication to creditors * * *" (Exh. 5, Rec., p. 19.) (Italics not in original.)

On March 23, 1917, there was filed an application for confirmation of the composition. It alleges that "Samuel A. Myers & Harry Myers * * * had filed in court a schedule of their property and a list of their creditors, as required by law, they offered terms of composition to their creditors * * *" (Exh. 6, Rec., p. 20.)

On May 28, 1917, the District Court confirmed the composition. (Exh. 8, Rec., p. 22.)

At no time was the firm adjudicated bankrupt. (Rec., p. 15.)

The International Trust Company proved the notes against the firm for $20,000 and received the payment in composition on this proof, which left a balance of $11,932.07. (Rec., p. 15.) No payments were received on account of the individual endorsements.

Thereafter the Bank brought a bill in equity in the State Court against Samuel Myers and Harry Myers as individuals, upon their endorsements, and sought to recover the unpaid balance of $11,932.07 with interest. The defendants in their answer set up that the confirmation of the composition, Ex-

hibit 8, discharged them from liability upon their individual endorsements. The Supreme Judicial Court of Massachusetts held that it did not. (Rec., pp. 29 to 34.)

The defendants now claim that the Supreme Judicial Court of Massachusetts has failed to accord to the discharge its full efficacy as interpreted by the Courts of the United States and that the decision of the State Court creates a conflict with the decisions of the Supreme Court and of the Federal Courts, and all Courts of other States on the same question.

ARGUMENT.

I.

The endorsement of the notes by each of the partners as individuals created obligations separate and distinct from the firm obligations, and made each of the partners individually liable upon those endorsements.

The plaintiff is not seeking to get a dividend greater than what the other creditors received. It is seeking to enforce a right which other creditors did not have.

When these notes were given, the Myers intended to give, and did give, two different obligations:

(a) The promise of the firm as a firm to pay the notes;

(b) The promise of Samuel Myers and of Harry Myers individually to pay the notes. This promise arose from the individual endorsements.

> "* * * A partner indorsing individually was a party different from the partnership and thereby might incur a double liability arising from the two distinct contracts by which he had bound himself."

Fourth National Bank v. *Mead*, 216 Mass. 521 at 523.

See also *Uniform Partnership Act* (Mass.) St. 1922 c. 486, Sec. 15.

"* * * An individual who is engaged in business with others as partners may become liable as one of such partners, and at the same time individually as distinguished from his liabilities by reason of his partnership relation. A frequent example and illustration of such liability arises where a partner becomes liable upon an instrument signed in the partnership name and at the same time by his individual signature as a guarantor or surety thereon."

Matter of Peck, 206 N. Y. 55, 60;
Wilder v. *Keeler*, 3 Paige 167 (N. Y.)

The Bankruptcy Act recognizes these two rights.

Such a form of firm note and endorsement by the individual partners gives the holder the right to recover all he can out of the firm assets, and also out of the personal and individual assets of each of the endorsers. In the event of bankruptcy of the firm and of the partners, the holder of such notes may prove against the firm assets and receive the dividend that firm creditors receive, and also against the individual assets of each of the partners and receive the dividend which the personal and individual creditors receive.

In re Frazer, 221 Fed. 83;
In re McCoy, 150 Fed. 106 (C. C. A. 7th); affirmed under title of *Chapman, Trustee*, v. *Bowen*, 207 U. S. 89;
See also *Second National Bank* v. *Yankou*, 4 Fed. (2nd) 445 (C. A. D. C.)

In *Reynolds* v. *New York Trust Co.*, 188 Fed. 611, at page 613 (C. C. A. 1st), it is said:

"Where there are separate and distinct express contracts of the firm and of a co-partner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates."

See also *Robinson* v. *Seaboard National Bank*, 247 Fed. 667, at page 669; affirmed on motion for rehearing, 247 Fed. 1007 (C. C. A. 3d).
See *In re Coe*, 183 Fed. 745 (C. C. A. 2nd).

It has been urged repeatedly by the Myers that the Bank had only one claim and they persistently cite *Abbott* v. *Andersen*, 265 Ill. 285, as authority. That case is entirely different. A firm creditor proved against the firm assets and then sought to recover the deficiency from the individual estates. The Court said at page 286:

"The sole question of law was whether the discharge of the partnership in bankruptcy discharged the partners, individually, from the partnership debts."

In such a case the creditor had only one claim, the obligation against the firm, and was attempting to get double payment of one claim. The question of the discharge of the individual partners from their individual debts apart from their firm debts was not involved. In the present case there are the two claims, the obligation of the firm and the obligation of individual partners arising out of the separate and distinct promises to pay by reason of the individual endorsement of the notes. The Bank seeks single payment of each of two distinct contracts.

The final decree in the case before the Court brings out the difference between *Abbott* case and the present case. Harry Myers did not endorse one note (Rec., p. 13). Samuel A. Myers endorsed all (Rec., pp. 6-9, 13). The final decree

(Rec., 26) is that Harry Myers pay $16,264.64 and Samuel A. Myers pay $18,051.82. The difference is due to the endorsements. Yet as a firm each was liable for exactly the same sum.

II.

The discharge given a bankrupt follows the pleadings in the bankruptcy proceedings.

The usual procedure in a bankruptcy case is that, after petition, answer and schedules are filed, the debtor is adjudicated bankrupt; the property of the bankrupt is turned over to a trustee, and the debtor moves for a discharge.

Partnership have caused two lines of decisions to develop; one, that the partnership is an entity separate and apart from the individual members of the firm; the other, that there is no entity. In the first line of cases the partnership may be adjudicated bankrupt without the individual partners being bankrupt.

> *In re Meyer*, 98 Fed. 976 (C. C. A. 2d);
> *In re Bertenshaw*, 157 Fed. 363 (C. C. A. 8th);
> *Horner* v. *Hamner*, 249 Fed. 134 (C. C. A. 4th).

In the second the partnership cannot be insolvent unless the partners are also.

> *In re Forbes*, 128 Fed. 137;
> *Vaccaro* v. *Security Bank*, 103 Fed. 436 (C. C. A. 6th);
> *Francis* v. *McNeal*, 228 U. S. 695, but see *Liberty National Bank* v. *Bear*, 265 U. S. 365, 368.

The true rule seems to be that set out in *Fort Pitt Coal & Coke Co.* v. *Diser*, 239 Fed. 443 (C. C. A. 6th), at page 447:

> "* * * the adjudication in bankruptcy of a partnership on a ground involving its insolvency, includes a determination that the applicable portions of the separate estates of the partners, as well as the partnership estate, are in that proceeding to be subjected to the payment of the partnership debts, regardless of whether all or any of the partners themselves are adjudged bankrupt."

Further difficulty has arisen where by the pleadings the firm alone is before the Bankruptcy Court, and has been discharged from the firm debts, but no action has been taken by or against the individual partners.

In such cases there are two sets of debts affected by the proceedings:

(a) The discharge of the firm discharges the individual partners from the firm debts, so that they cannot be held subsequently to make good the deficiency.

> *Abbott* v. *Anderson*, 265 Ill. 285;
> *Armstrong* v. *Norris*, 247 Fed. 253 (C. C. A. 8th);
> *Francis* v. *McNeal*, 228 U. S. 695, at page 701, dictum.

Contra:

> *In re Bertenshaw*, 157 Fed. 363 (C. C. A. 8th);
> *Horner* v. *Hamner*, 249 Fed. 134, 141 (C. C. A. 4th).

(b) The discharge of the firm does not affect the individual and personal debts of the individual partners, so that each partner can be held subsequently for a payment of his own individual and personal debts.

> *In re Neyland & McKeithen*, 184 Fed. 144, 150;
> *Horner* v. *Hamner*, 249 Fed. 134 (C. C. A. 4th);
> *In re Sugar Valley Gin Co.*, 292 Fed. 508, 509.

The present case clearly falls into the latter class, as the claim upon which this action is brought is founded upon the

personal and individual debts of each of the partners. It is not an attempt to hold the defendants upon the firm debts.

The petitioners in their brief in support of their petition cite an extract from *Bear* v. *Liberty National Bank,* 285 Fed. 703, at 705 (C. C. A. 4th). An involuntary petition in bankruptcy was filed against a partnership alleging that it was insolvent. There was no allegation that the individual partners were insolvent and no prayer that they be adjudged bankrupt as individuals. The firm was adjudicated, the individuals were not. The Bank prior to the bankruptcy proceedings had obtained a judgment against the firm on notes and against the individuals because the notes were endorsed by the individuals. By local law the judgment became a lien on the real estate. More than nine months after the judgment the individuals filed petitions in bankruptcy and were adjudicated. In this proceeding the Bank filed proof of claim alleging a lien on the real estate. On objections of the trustee the District Court held that the first bankruptcy proceeding had merely adjudged the firm bankrupt and not the individuals. The Circuit Court of Appeals reversed the District Court on the ground that the adjudication of the partnership was necessarily an adjudication of the bankruptcy of the individuals composing it and the lien arose within four months and was lost. On certiorari to the Supreme Court, *Liberty National Bank* v. *Bear,* 265 U. S. 365, the Court said at page 368, "Upon the question whether the adjudication of a partnership involves an adjudication of the bankruptcy of the individual partners, there appears to have been a diversity of opinion in the lower federal courts. The decision in *Francis* v. *McNeal,* 228 U. S. 695, upon which the Circuit Court of Appeals chiefly relied, did not involve a determination of this direct question. And we do not find it necessary to determine it now; since, even if the adjudication of the bankruptcy of the Company (firm) operated as an adjudication of the bankruptcy of the Beckers individually—which we do not intimate—nevertheless, in the absence of either

pleading or proof as to their insolvency when the Bank recovered its judgment, there is no ground under Sec. 67f of the act for annulling the lien thereby acquired upon their property."

Whatever the conflict may be, the discharge, however, follows the pleadings.

In *Francis* v. *McNeal*, 228 U. S. 695, cited by the petitioners, the Bankruptcy petition was against both the firm and the individuals and expressly alleged that they were bankrupt both individually and as a firm (p. 698). The firm was adjudicated bankrupt. An order was made directing that the property of one of the individuals be turned over to the Trustee to administer. It was held that the order was correct.

This *McNeal* case has no bearing on the *Myers* case now before the Court. The petition in the *McNeal* case alleged both the firm and the individuals were insolvent. The petition in the *Myers* case did not. In the *McNeal* case any action taken as to the property either of the firm or of the individuals followed the pleadings.

There can be no adjudication of the bankruptcy of either the firm or the individuals, unless it be shown that both are insolvent. The insolvency of both must be averred and proved.

Vaccaro v. *Security Bank*, 103 Fed. 436, 442.

In *In re Griffith*, 280 Fed. 878, the petition against the firm was dismissed because it did not allege the insolvency of the partners.

Lowell, J., in the Massachusetts District Court, in administering the 1898 Bankruptcy Law, insisted that a petition against a partnership must include the individual partners. He "has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time."

In re Forbes, 128 Fed. 137, 140.

The form Exhibit 3 sets out the practice and provides schedules for both the firm and the individuals, and these forms constitute the pleadings upon which subsequent adjudication is made.

Where, however, either the firm or the individuals alone are named in the petition or answer, then the subsequent adjudication can be made only against such as are named.

If the individual is adjudicated, a discharge from the firm debts will not be granted until the firm is brought into the proceedings.

In re Morrison, 127 Fed. 186;
In re Meyer, 96 Fed. 408;
In re Laughlin, 96 Fed. 589;
In re McFann, 96 Fed. 592;
In re Hartman, 96 Fed. 592.

So also when the partnership is adjudicated and the individuals are not.

In re Pincus, 147 Fed. 621;
Horner v. *Hamner*, 249 Fed. 134, 141 (C. C. A. 4th).

See also,

In re Samuels, 215 Fed. 845, 851-852 (C. C. A. 2nd).

"* * * To grant this relief (discharge) without bringing their individual property and individual creditors into this proceeding is not only without statutory authority, but is clearly wrong." *In re Pincus, supra*, p. 625.

In *In re Hale*, 107 Fed. 432, the proceedings were against "Hale Bros. or L. H. Hale and Mary C. Hale trading as Hale Bros." (p. 433). The two individuals did not file any individual schedules, and it was held that the individuals were not entitled to a discharge.

See also,

Horner v. *Hamner*, 249 Fed. 134, 137.

In the present case the petition alleged: "Samuel A. Myers and Harry Myers, both of Brookline in the County of Norfolk, co-partners trading as S. A. & H. Myers have for the greater portion of six months next preceding the date of filing this petition, had *his* principal place of business at Boston, in the County of Suffolk, and State and district aforesaid and *owes* debts to the amount of $1000," were insolvent and had committed an act of bankruptcy, "wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon Samuel A. & H. Myers, as provided in the acts of Congress relating to bankruptcy, and that *he* may be adjudged by the court to be *a bankrupt* within the purview of such acts" (Exh. 2) (italics are counsel's).

The answer and schedules were those of the partnership: "Samuel A. Myers of Boston and Harry Myers of Brookline, respectfully represent that they clothing business have been partners under the firms name of S. A. & H. Myers, having their principal place of business at Boston * * * that the said *partners* owe debts which they are unable to pay." They allege that Schedule A contains "a full and true statement of all the debts of *said partners*," and B "an accurate inventory of all the property * * * *of said partners*." Each then expressly swore that he had "no individual debts" and no individual assets. The oath reads:

> "Samuel A. Myers and Harry Myers, the debtors mentioned and described in the *foregoing petition*, do make solemn oath that the statements contained therein are true to the best of their knowledge, information and belief" (Exh. 3) (italics are counsel's).

The International Trust Company is listed as a creditor for $20,000. The fact of the endorsements does not appear in the schedules.

The endorsement on the back of the schedules reads:

> "Debtors' Schedules"
>
> "Samuel A. Myers and Harry Myers as S. A. & H. Myers, of Boston, Mass., residence 36 Otis Street"

"Filing the schedule in a proceeding in bankruptcy is an ex parte act on the part of the bankrupt, and in that proceeding is a solemn admission which unless corrected, binds him."

Horner v. *Hammer*, 249 Fed. 134, 137.

There was no correction of these schedules.

The offer in composition "respectfully represents" and incorporates the schedules as filed, as the list of creditors to whom the offer is made. It states that—

"They have filed in Court a schedule of their property and a list of creditors to be filed by bankrupts" (Rec., p. 18).

Similarly in the application for confirmation they "respectfully represent to the court that, after they had been examined in open court (or at a meeting of their creditors) and had filed in court a schedule of their property and a list of their creditors as required by law, they offered terms of composition to theid creditors" (Rec., p. 19). On this application the composition was confirmed.

In *In re E. W. Adams & Co.*, 283 Fed. 431, there was a partnership, one member of which had died. Involuntary proceedings were brought against the partnership and the surviving partners. Before adjudication a composition was offered and accepted by a majority of creditors. The estate of the deceased partner was not made a party. It was held that the partnership and surviving partner may be adjudged bankrupt and may offer a composition. It is said:

"Objection is made that this would be unjust to the creditors, because it would *cancel the debt* and prevent collection of any part thereof from the estate of the deceased partner. But a composition does not have the effect of *cancelling the debt*, but merely prevents the enforcement of it against those debtors who are parties to the bankruptcy proceedings, and that is, in this case, the partnership assets of E. W. Adams & Co., and the two surviving partners individually" (p. 433).

It is submitted that the firm alone was the party in the proceedings and that the discharge arising out of the confirmation of the composition discharged these respondents only from the debts which they listed as the partnership debts, and had no effect upon the individual liabilities.

III.

The composition is to be construed strictly, and affects only those debts which are set out in the schedules.

The cases cited above refer to the ordinary bankruptcy case, where there is an adjudication. A composition is entirely different.

In the ordinary bankruptcy case there is an adjudication that the debtors are insolvent. The assets are then taken by the Court and liquidated by a trustee, who divides these assets *pro rata* among the creditors who have proved. If any creditor fails to prove, his share goes to increase the share of those who have. Section 12 of the Bankruptcy Act provides for a composition. It is set out in Appendix A hereof. The schedules referred to in Section 12 are those required in Section 7-a, (8), which deals with the duties of bankrupts.

In *Cumberland Glass Co.* v. *De Witt*, 237 U. S. 447, at page 453, it is said:

> "The nature of composition proceedings is nowhere better stated than by Judge Lowell in *In re Lane*, 125 Fed. Rep. 772, 773, in which it is said:
>
> " 'The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be

realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12-e (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides: 'Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.' Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no bargained release by the creditor. The creditor takes all his debtor's property whether the debtor likes it or not. * * * The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3448]) has the same purpose, and does not apply to composition. But if the composition is paid the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more.'"

In *Nassau Works* v. *Brightwood Co.*, 265 U. S. 269, at 271, it is said:

"Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings. *Cumber-*

land Glass Co. v. *De Witt*, 237 U. S. 447, 454. It originates in a voluntary offer by the bankrupt; and results, in the main, from voluntary acceptance by his creditors."

And again at page 273:

"There is no 'bankrupt estate' where there is no adjudication. And even where there is an adjudication, the proof made is not against the 'bankrupt estate,' if a composition follows. The claim is against funds deposited by the debtor pursuant to a bargain with his creditors."

A composition is in derogation of the common law and compels any dissenting creditor to accept the percentage satisfactory to the majority and deprives a dissenting creditor of his remedy for the balance.

In re Frear, 120 Fed. 978, 980.
In re Kinnane Co., 221 Fed. 762, 766.
In re Goldstein, 213 Fed. 115, 116.

In *In re Rider*, 96 Fed. 808, speaking of a composition as being in derogation of common-law rights and the dangerous exercise of legal power to compel a minority to surrender all claim upon the debtor's estate at the dictation of the majority, the Court says, at page 809:

"* * * A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed. Loveland on Bankruptcy, p. 549. *In re Shields*, Fed. cases No. 12784.

"The present law should be construed in the light of similar prior enactments and any doubt should be resolved against those who seek to deprive creditors of the right to have the debtor's property applied to the payment of his debts."

It must be strictly construed.

In re Kinnane Co., 221 Fed. 762, 766;
In re Rider, 96 Fed. 808, 809, 810.

The confirmation of a composition offered to the firm creditors does not discharge the debtor from the debts due individual creditors.

In re Coe, 183 Fed. 745 (C. C. A. 2nd).

Individual creditors are not permitted to participate in the fund deposited with an offer of composition to firm creditors,

United States v. *Kaufman,* 267 U. S. 408,

and the reason is clear. There is no offer made to the individual creditors which they can accept. No bargain can be made.

This Court speaks of the composition as an offer and a bargain, but it is a bargain forced upon creditors who may not want it. When the Myers filed their schedules setting forth their partnership debts, they made an offer to those creditors whom they listed. They deliberately set out the debts from which they wanted relief. The bargain which the Court imposed is one only with those to whom the offer is made—the firm creditors. No offer was made to the individual creditors. It is difficult to see how any bargain can be created when there was no offer upon which that bargain can be founded.

It is argued that this was an offer to pay all debts both firm and individual. Section 12 b requires the deposit of the "consideration" to be paid to the creditors. It is not claimed and there is no evidence that the Myers deposited the money necessary to pay the 20% in cash and the notes on account of the individual debts arising out of these endorsements.

In *In re Rider, supra,* the Court says that the present law should be construed in the light of similar prior enactments.

The Massachusetts Supreme Court passed on the effect of a composition under the Bankruptcy Act of 1867. Section 12 of the present Act is derived from the amendment of 1874 to Section 43 of the Bankruptcy Act of 1867. So much of Sec-

tion 43 as relates to compositions is set out in Appendix B. The first paragraph provides for a meeting of creditors. The section continues:

> "The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

This is the only provision for a list of creditors in connection with a composition in the 1867 Act.

Section 12 of the present Act is annexed as Appendix A.

A comparison of the sections shows that the principle in both is the same. In the old Act the debtor produced his list of creditors at the meeting. Under the present Act he files his list in court.

In *Hewes* v. *Rand*, 129 Mass. 519, the alleged bankrupt made an offer in composition. The plaintiff's claim was set out in the schedules as being for the sum of "$750. notes and unsettled account," while in fact it was for $777.81. He declined to accept the dividend. It was held that, if the debt is stated at an amount less than it really is, the creditor is not bound by the composition and may sue for the full amount as if no composition had been made.

In *Stone* v. *Simonds*, 131 Mass. 457, the debtor in his schedules set out the name of the holder of a note as "Alanson Stone," when in fact the holder was Alason Stone administrator. The dividend in composition was paid to the attorney for Alanson Stone. In a suit brought by Alanson Stone, administrator, by the same attorney, it was held that the composition did not discharge this note. At page 462 it is said:

> "But as it [composition] differs from ordinary proceedings in bankruptcy in leaving the estate in the control of the bankrupt, instead of committing the adminis-

tration of the estate to assignees or trustees appointed by the court, the act of congress has made it an express condition to its taking effect against any creditor, that his name and address and the amount of his debt shall be set forth in the preliminary statement of the debtor, as originally filed with the object of securing notice to all creditors, or as afterwards amended by leave of court in bankruptcy upon like notice; and a creditor, whose name or the amount of whose debt is not truly stated in the debtor's schedule, is not affected or prejudiced by the composition, but may sue the debtor at law as if no proceedings for composition had been had."

In *Ex parte Trafton*, 2 Lowell, 505, Lowell, J., at page 506, says:

"I say that this is the question [whether disputed claims are to share in the composition], because it is impossible to admit that if the debtor does all he can, by putting down the name and residence of the person who alleges himself a creditor, it shall be optional with the latter to come in or not, as he chooses. No doubt, this is his privilege, if his name is omitted altogether, because the debtor cannot object to any creditors sharing with the others; but this option arises out of the default of the debtor in omitting the name.

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"The creditor has a right to come in and prove the true amount, and if he fails to do so, it will be for the State courts to say whether he is bound by the composition."

The bank could make no condition that the acceptance of the composition did not affect the debt arising under the endorsements. The Court enforced the offer in face of the objection of the bank and the expressed unwillingness of the bank to accept any composition whatsoever.

It is respectfully submitted that the confirmation of the composition did not affect the claims of the individual creditors arising out of the personal and individual obligations

of the defendants. These defendants, by making an offer in composition, sought to avoid the disgrace arising out of the bankruptcy proceeding. They prepared their own lists of creditors to whom they wished to make an offer, and made that offer to that list of creditors. The Court confirmed the offer, and by such confirmation the balance of the debt due to those creditors was wiped out. The defendants withheld from the Court their individual debts and obligations, and made no offer to them. The plaintiff was one of those individual creditors. It now asks that these debtors pay their individual debts.

Respectfully submitted,

JOHN R. LAZENBY,
For the Respondent.

APPENDIX A.

Sec. 12. *Compositions, when Confirmed.*

*a A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.**

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to per-

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*Amendment June 25, 1910, Ch. 412, Sec. 5, Comp. St. §9596.

form any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

APPENDIX B.

BANKRUPTCY ACT OF 1867.

Sec. 43 * * *

(R. S., sec. 5103 a (22 June, 1874, Ch. 390, sec. 17, 18 Stat. 182)—That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resoluion shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he or, if he is so prevented from being at such meeting, some one in his

behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed: and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note he shall be required

to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro rata payment or satisfaction in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not in such case be computed in calculating periods of time prescribed by said act.